United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7239

UNITED STATES COURT OF APPEALS

For the Second Circuit

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P/S

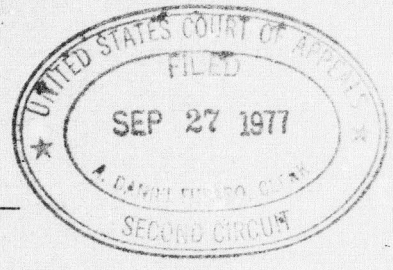
NATIONAL EQUIPMENT RENTAL, LTD.,

Plaintiff-Appellant,

-against-

H. WALTER HENDRIX, III and JEAN K. HENDRIX,

Defendants-Appellees.



APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

	PAGE
Table of Authorities	
Cases	ii
United States Constitution	iii
Statutes	iii
Other Authorities	iv
Issues Presented	1
Introduction	2
Statement of Facts	3
Argument.	
Point I: The Evidence was Overwhelming that the Transactions Between National and Hendrix Were Loans Subject to the Usury Laws of New York	9
Point II: National's Contention that the Usury Laws Do Not Apply to the Transactions at Bar Because Hendrix Utilized the Funds Advanced for a Business Purpose Is Without Merit	19
Point III: National's Motion to Strike Hendrix' Demand for a Jury Trial Was Properly Denied Since the Jury Trial Waiver Provision in National's Adhesion Contracts Did Not Constitute a Knowing and Intelligent Waiver by Hendrix of His Constitutional Right to a Jury Trial	25
Conclusion	31

TABLE OF AUTHORITIES

CASES:	PAGE
Aetna Insurance Co. v. Kennedy, 301 U.S. 389 (1937)	26
Beacon Theatres v. Westover, 359 U.S. 500 (1959)	26
Burr v. Capital Reserve Corp., 80 Cal. Rptr. 345, 458 P. 2d 185 (1969)	18
Dimick v. Schiedt, 293 U.S. 474 (1935)	26
Fuentes v. Shevin, 407 U.S. 67 (1971)	28
Hall v. Eagle Ins. Co., 151 App. Div. 815, 136 N.Y. Supp. 774 (1912), aff'd, 211 N.Y. 507, 105 N.E. 1085 (1914)	10
Heyman v. Kline, 456 F. 2d 123 (2d Cir. 1972)	26
Johnson v. Zerbst, 304 U.S. 458 (1937)	26
Leibovici v. Rawicki, 57 Misc. 2d 141, 290 N.Y. Supp. 2d 997 (Civ. Ct. N.Y.C. 1968)	22, 23
Malmud v. Blackman, 251 App. Div. 192, 295 N.Y. Supp. 398 (2d Dept. 1937)	21
McGalliard v. Liberty Leasing Co. of Alaska, Inc., 534 P. 2d 528 (Sup. Ct. Alaska 1975)	14, 17, 18
McKeeman v. Commercial Credit Equipment Corp., 320 F. Supp. 938 (D. Neb. 1970)	14, 16, 18
National Equipment Rental, Ltd. v. Custom Machine Engineering Div. Chromalloy Div. of Okla., Index No. 112110/75 (Sup. Ct. Nassau Co. 1977)	30
National Equipment Rental v. Stanley, 283 F. 2d 600 (2d Cir. 1960)	14, 15, 16, 20

CASES:	PAGE
National Equipment Rental, Ltd. v. Stanley, 177 F. Supp. 583 (E.D.N.Y. 1959)	10, 14, 15, 18
National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964)	27
D. H. Overmyer v. Frick Co., 405 U.S. 174 (1972)	29, 30
Quackenbos v. Sayer, 62 N.Y. 344 (1875)	10
Ranhand v. Sinowitz, 26 N.Y. 2d 232, 257 N.E. 2d 877 (1970)	19
Schneider v. Phelps, 41 N.Y. 2d 238, 359 N.E. 2d 1361 (1977)	22, 23
Thurston v. Cornell, 38 N.Y. 281 (1868)	10
Tuition Plan, Inc. v. Kicari, 70 Misc. 2d 918, 335 N.Y. Supp. 2d 95 (Suff. Co. Dist. Ct. 1972)	12
Vee Bee Service Co. v. Household Finance Corp., 51 N.Y. Supp. 2d 590 (Sup. Ct. N.Y. Co. 1944), aff'd, 269 App. Div. 772, 55 N.Y. Supp. 2d 570 (1st Dept. 1945)	12
Williams v. Walker-Thomas Furniture Co., 350 F. 2d 445 (D.C. Cir. 1965)	29
UNITED STATES CONSTITUTION:	
Seventh Amendment	
STATUTES:	
N.Y. General Obligations Law, §5-501(6)	20
N.Y. General Obligations Law, §5-521	20, 24
U.C.C. §2-302	29
U.C.C. §9-504	2

PAGE

OTHER AUTHORITIES:

New York State Legislative Annual,
P. 94 (1974) 21

32 N.Y. Jur. Interest and Usury,
§5 (1963). 22

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NATIONAL EQUIPMENT RENTAL, LTD., :

Plaintiff-Appellant, :

-against- : Docket No. 77-7239

H. WALTER HENDRIX, III and JEAN K. HENDRIX, :

Defendants-Appellees. :

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BRIEF FOR DEFENDANTS-APPELLEES

Issues Presented

1. Is the evidence legally sufficient to support the jury verdict that the transaction between the parties was and was intended to be a loan?

2. Are the New York usury laws applicable to a loan made to a non-corporate borrower for an amount less than $250,000 where the proceeds of the loan are used by the borrower to pay for equipment he is using in earning his living and to protect the substantial equity he had in the equipment?

3. Is the existence of a clause on the back side of a fine print, multi-paragraph and complex contract of adhesion purporting to waive the constitutional right to a jury trial sufficient to establish that the constitutional right was knowingly and intelligently waived and overcome the presumption against such waiver?

INTRODUCTION

National Equipment Rental, Ltd. ("National"), plaintiff-appellant, appeals from a judgment entered on April 7, 1977 in the Eastern District of New York (Weinstein, D. J.), following a jury trial, dismissing its complaint against H. Walter Hendirx, III ("Hendrix") and his wife, Jean K. Hendrix, defendants-appellants.

National commenced an action against Hendrix and his wife (as guarantor) to recover the unpaid accelerated balance on two agreements designated "equipment leases" (A5-9).* After making some four monthly payments to National out of a total of 42 and 49 monthly payments scheduled under the two agreements, Hendrix became unable to make his monthly payment. The equipment was seized by National and sold at a private sale.** Hendrix was credited with the sale proceeds.

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*References in parentheses preceded by "A" are to pages of the appendix.

**In a previous trial held before the Honorable Jack B. Weinstein and a jury in September, 1976, the jury found that the sale conducted by National was "commercially unreasonable" under U.C.C. §9-504 as to the sale's time, method, manner, place and terms (A3, see docket entry for 9-17-76). Prior to entering judgment as a result of that jury verdict Judge Weinstein ordered that a second trial be held on the issue of usury (A3, see docket entry for 2-3-77). National's instant appeal is solely from the judgment dismissing its complaint following a jury determination in Hendrix' favor on the issue of usury. Accordingly, National's appeal point addressed to the issue of the commercial reasonableness of its post-seizure sale of the equipment (appellant's brief [hereafter, "app. br."] Point II, pp. 7-11) is not properly before this Court. Similarly, National's reliance on testimony

Hendrix' defense was that the agreements in question were void usurious loan agreements (A10-19, A156). National conceded that if the transactions in question were loans then the interest rate on those transactions exceeded the maximum legal rate of interest in New York (A160-161).*

The jury found by "clear and convincing evidence" that the transactions were loans. Accordingly, the agreements were held void and National's complaint was dismissed.

STATEMENT OF FACTS

The Underlying Transactions

Hendrix, the sole proprietor of a small construction company in Lexington, South Carolina, possessed two pieces of heavy construction equipment he was purchasing over time from two South Carolina equipment dealers (A62-66). He was paying $5,200 per month to the Jeff Hunt Machinery Co. towards the $103,000 purchase price of a Caterpillar 623 tractor-scraper and $2,000 per month towards the $30,000 purchase price of an International Harvester TD-15 bull dozer

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(ftn contd)

and exhibits introduced at the first trial is improper since the judgment appealed from is based solely on the jury verdict at the second trial.

*By pretrial stipulation, both parties agreed that New York law governed the issues in this case (A-4, see docket entry for 2-18-77).

(A66-68). After paying some $20,000 toward the purchase price of each piece of equipment, Hendrix became unable to afford the $7,200 total monthly payments (A69-70). He told Reed Hanna, a salesman for one of the dealers, that he wanted to obtain a loan so that he could pay off the balances owed to the two dealers and make monthly payments to a lender in an amount less than $7,200 (A70-71).

Shortly thereafter, Robert P. Kelly, a man Hendrix knew was in the financing business, was brought by Hanna to see Hendrix (A72). Kelly had with him National's printed form agreements he had obtained from John Shoup, National's branch manager for the Carolina region (A72-73; A112). Hendrix questioned the "equipment lease" designation on the agreements and asked Kelly whether a lease arrangement was not more appropriate for a businessman interested in a tax deduction (A73). Hendrix advised Kelly that he was not in need of a deduction but rather wanted a loan so that he could pay off the balance owing on the two pieces of equipment and pay back the lender at a monthly rate lower than his current obligations to the vendors (A73).

Kelly, who received a commission from National of $2,437.34 on the Hendrix agreements (A43; Exh. B, A190), told Hendrix "it was a standard agreement and that's the way National loaned their money. They loaned their money through a lease agreement" (A74). When Hendrix expressed his concern

that he should consult an attorney because he did not understand the complex agreements, Kelly reassured him that the forms were standard and signing them "was the only way" Hendrix "could get the money" (T99).

Hendrix executed the agreements and his wife was required by National to execute a guaranty (A73; Exh. 5, A180).

National conducted a thorough credit investigation on Hendrix and it executed the agreements when the information obtained from the credit investigation was found favorable (A49, A113-115).

National then forwarded $31,161.62 to Western Carolina Tractor Co. (Exh. K, A202a) and $84,442.74 to Jeff Hunt Machinery Co. (Exh. O, A210). These amounts were exactly what Hendrix owed the two vendors on the equipment (A69-70, A73-74).

Shortly after the agreements were executed, National filed U.C.C. financing statements to formalize its security interest in the equipment (A47; Exhs. I, I(1), A197-198) and assigned the agreements to the First National Bank of Chicago as partial security for its own loans (A47; Exhs. 1 and 2, A170-172).

The Agreements

The agreements, which could have well served as an exemplar of legalese for New York's recent enactment of

the plain language law, were found to be "contracts of adhesion" by Judge Weinstein.*

Under the terms of the agreement relating to the International Harvester bulldozer (Exh. 1, A170), Hendrix was obligated to pay $866.29 per month for 49 months and under the terms of the agreement relating to the Caterpillar tractor-scraper (Exh. 2, A172), Hendrix was to pay $2,744.39 per month for 42 months. National determined these monthly amounts "by the use of interest or rate factor tables" applied to the amount of cash it advanced (A36, A47-48) and the interest rate used in the calculation was a certain amount over the prime rate of interest (A48-50; see also Exhs. J [A199] and M [A204] where National's "yield" on the agreements is compared with the prime interest rate).

Although National's general counsel, Gerald Jacobs, denied that Hendirx' monthly payment had principal and interest as its components, he admitted being aware that in its 1974 10K filing with the S.E.C., National stated (A60-61):

> "Finance leases return to NER during their noncancellable original term NER's invoice cost of the equipment plus interest charges, related expenses

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*Judge Weinstein made this finding in holding prior to the trial that the jury trial waiver clauses in the agreements were unenforceable (see Point III, infra).

and a profit on investment."
(Emphasis supplied.)

and that the agreements in question here were National's "finance leases" (A61).

Hendrix was granted an option (Exh. 3, A178) to "purchase" the International Harvester bulldozer and was required, at National's option, to "purchase" (Exh. 4, A179) the caterpillar tractor.* The permissive and mandatory options were exercisable at the expiration of the term of the agreements for an additional lump sum payment by Hendrix of 10 percent of National's cash advance.

Under the terms of the agreements, Hendrix was required to pay the state use taxes, bear all risk of loss on the equipment, pay for repairs and insure the equipment against loss (A45-47; see also Exhs. 1 and 2, ¶'s 5, 8 and 10, A170-173).

National's Business

Simply put, National's business consists of advancing cash and collecting monthly repayments. The advance is secured by a security interest in equipment which remains in the possession of the borrower. National

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*With respect to this so-called "purchase agreement," National's general counsel testified (A44):

"If Mr. Hendrix did not opt to purchase the equipment then National could require him to purchase it. . . ."

neither inspects nor appraises the equipment (A75) and had no facilities to make repairs (A41). National writes agreements with respect to a wide variety of equipment, machinery and other items such as airplanes, railroad cars and computers (A40); but has no showrooms, catalogs or inventory (A41). What National deals in is money.

As Gerald Jacobs, National's general counsel, testified at trial (A41):

> "Q. Am I also correct that it [National] has no inventory?
> A. Its only inventory is money."

ARGUMENT

POINT I

The Evidence Was Overwhelming that the Transactions Between National and Hendrix Were Loans Subject to the Usury Laws of New York

The sole issue presented to the jury was whether the transactions between National and Hendrix were loans as Hendrix contended or leases, conditional sales contracts or purchase money mortgages as National contended (A161). The jury found that the transactions were loans. Because National agreed that if the transactions were loans the interest rate on the loans was in excess of the legal maximum rate (A160-161), the agreements were held void as usurious loan agreements and National's complaint was dismissed (A168, A211).

On appeal, National again urges that the transactions were not loans (app. br. Point III, pp. 12-14) and that the evidence was legally insufficient to support the finding that National intended a loan (app. br. Point IV, pp. 15-17).

It is fundamental that a transaction must be judged by its true character as gleaned from its substance and all surrounding facts and circumstances, and not merely by its

purported form.

> "The transaction must be judged by its real character rather than by the form and color which the parties have seen fit to give it." Quackenbos v. Sayer, 62 N.Y. 344, 348 (1875).

See also, Hall v. Eagle Ins. Co., 151 App. Div. 815, 826, 136 N.Y. Supp. 774 (1912), aff'd, 211 N.Y. 507, 105 N.E. 1085 (1914); National Equipment Rental, Ltd. v. Stanley, 177 F. Supp. 583, 585 (E.D.N.Y. 1959).

Thus, it follows that whatever label National attached ("equipment lease") or now seeks to attach ("conditional sale" and "purchase money mortgage")* to the transactions at bar, the usury laws are applicable where the transaction is, in its substance, a loan. And the intention of the parties--a question of fact--is the key inquiry in determining the true nature of the transaction. Thurston v. Cornell, 38 N.Y. 281, 286 (1868); National Equipment Rental v. Stanley, supra, 177 F. Supp. 583, 585.

The evidence was overwhelming that the transactions between Hendrix and National were in fact and were intended

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*The claim that the transactions were conditional sales or purchase money mortgages is disingenuous. As National's general counsel testified (A135):

> "Q. Mr. Jacobs, the agreements in question here are not termed purchase money mortgages, are they?
> A. No.
> Q. And the agreements in question here are not termed conditional sales contracts, are they?

by both parties to be loans. The discussions had between the parties prior to execution of the agreements, the effect and terms of the agreements, National's admissions, and the conceded nature of National's business (as set forth in its 10K filing with the SEC) provide ample and compelling evidence to sustain the jury's finding that the transactions were loans.

When Hendrix became unable to meet his monthly payments to the two South Carolina equipment vendors he was purchasing the equipment from, he requested Reed Hanna, an agent of one of the companies, to arrange a long term loan to enable him to pay off both vendors and reduce his monthly payment (A70-71). Hanna introduced Hendrix to Kelly, a representative of a South Carolina financing company acting in behalf of National (A72-76, A112-113). When Kelly met Hendrix he had with him National's agreement forms, already executed by National (A72). Hendrix told Kelly that he wanted a loan to pay the vendors and protect his equity (A94). Hendrix' query as to the designation

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(ftn contd)

A. No.
Q. In fact you contend that they are leases, don't you?
A. Yes."

"lease"* on the forms was met by Kelly's response: "that's the way National loaned their money" (A74, A83, A85-86, A88). Indeed, Hendrix was assured by Kelly that executing the agreements "was the only way [he] could get the money" (A99).

The agreements became effective only following a thorough credit investigation of Hendrix (A49, A115-116).

National's entire role in the transaction was to supply funds and collect monthly payments. Its only interest in the equipment was a security interest securing its advanced funds. National was never in possession of the equipment and did not inspect it or have it appraised prior to execution of the agreements (A75).

Under the terms of the agreements, National required Hendrix to assume all risk of loss, required Hendrix to pay all insurance and assume all responsibility for repairs (A46-47; Exh. 1, A171, ¶'s 5, 8, 10). It was contemplated that the equipment would remain in Hendrix' possession and that at the end of the payout period, National would release its security interest and title

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*The fact that each agreement calls itself a "lease" is not at all dispositive of whether the transactions are leases or loans. See, e.g., Tuition Plan, Inc. v. Kicari, 70 Misc. 2d 918, 335 N.Y. Supp. 2d 95 (Suff. Co. Dist. Ct. 1972). Vee Bee Service Co. v. Household Finance Corp., 51 N.Y. Supp. 2d 590 (Sup. Ct. N.Y. Co. 1944), aff'd, 269 App. Div. 772, 55 N.Y. Supp. 2d 570 (1st Dept. 1945).

would pass to Hendrix for a nominal sum (A76-77). Indeed, in one case, National required Hendrix to "purchase" the equipment at the end of the term (Exh. 4, A179, A38-39, A44-45).

National calculated the amount of the monthly payments it demanded from Hendrix by the use of interest tables applied to the amount of money it advanced (A36, A43, A48), evaluated its "yield" on the agreements by comparing its return to the prime interest rate (A48-49; Exh. J, A199), and told the SEC in its 10K filing that agreements of the type at issue here return to it the funds advanced "plus interest charges" (A60-61).

The transactions with Hendrix are typical of National's business. Although it writes agreements with respect to a wide variety of equipment, machinery and other products (A40), it has no showrooms, no repair facilities, no catalogs, and no inventory (A41, A111). In a very revealing concession, National's general counsel testified as follows (A41):

> "Q. Am I also correct that it [National] has no inventory?
> A. Its only inventory is money."
> (Emphasis supplied.)

See also A111.

Equally revealing was the statement of National's regional branch manager, Shoup, admitting:

> ". . . we [National] approved the loan. . . on a lease basis." (A107).

These factors all compellingly establish that the transactions between National and Hendrix were loans. National Equipment Rental, Ltd. v. Stanley, 283 F. 2d 600 (2d Cir. 1960); McKeeman v. Commercial Credit Equipment Corp., 320 F. Supp. 938 (D. Neb. 1970); McGalliard v. Liberty Leasing Co. of Alaska, Inc., 534 P. 2d 528 (Sup. Ct. Alaska 1975).

National Equipment Rental, Ltd. v. Stanley, supra, is directly in point. In that case National advanced funds for the "purchase" of drugstore equipment from Stanley, a South Carolina druggist. Under an agreement called a "lease" like the ones at bar, Stanley repaid National monthly and kept possession of the equipment. National advanced part of the money directly to Stanley and the remainder was advanced to a vendor who originally supplied the equipment to Stanley and who Stanley was paying monthly. The purpose of the agreement with National was, inter alia, to give Stanley "a longer time to pay out" (id., 283 F. 2d at 602).

When Stanley defaulted National sued to recover the accelerated unpaid "rentals." Stanley's defense that the agreement was a usurious loan, not a lease, was successful with a jury and a judgment was entered dismissing National's complaint (177 F. Supp. 583 [E.D.N.Y. 1959]).

This Court affirmed the judgment finding the following evidence sufficient to support the jury verdict: National's agent, Rosen, told Stanley that National would lend him money (id., 283 F. 2d, at 602); National made no inspection of the equipment (id., at 603); and required a good financial statement from Stanley (id.). The same factors are all present here. Hendrix was interested in refinancing so that his payments would be lower; he told National's agent, Kelly, he wanted a loan and Kelly told him "[the lease] is how National loaned its money" (A74); National never inspected the equipment and required a credit investigation of Hendrix.

The many additional factors present in this case which establish the transactions to be loan were not necessary to this Court's decision in Stanley. Thus, what the District Court stated in Stanley applies a fortiori here (177 F. Supp. 583, 587):

> "It cannot be doubted that there was evidence of a substantial kind before the jury which the jury could rationally conclude that a loan was intended."

National attempts to avoid the obvious impact of Stanley by suggesting the distinction that in Stanley "title to the equipment was originally in the debtor, sold to the creditor, and leased back to the debtor" (app. br. p. 13).

First, National misreads or does not recall Stanley: National did not acquire title to the equipment. As this Court wrote: "it [National] never acquired formal title to any of the new equipment . . ." (id., 283 F. 2d, at 603).

But even if such distinction could be found, it is one without a difference. The same basic transaction took place in Stanley as here: National spoke to Stanley about a loan, advanced funds and required monthly repayments; and as in the case at bar, National had no real interest in the equipment, other than a security interest to protect its loan.

McKeeman v. Commercial Credit Corp., supra, 320 F. Supp. 938, is also in point. There, the Court held that an agreement under which Commercial Credit had "leased" silos and other equipment was, in reality, a usurious loan. The court relied on the following factors: title passed at the end of the term for a nominal sum; all costs, expenses, fees and charges in connection with the use and operation of the equipment were paid by the user; all risk of loss was assumed by the user; insurance had to be provided by the user; and "all burdens of ownership are placed with" the user (id., 320 F. Supp., at 947). The Court wrote:

> ". . . the conclusion seems inescapable that the 'lease' is, in fact, a subterfuge for a loan transaction. . ." (id., at 943).

Again, the same factors are present in the case at bar. Title was to pass to Hendrix at the end of the term for a nominal sum and Hendrix was required to bear "all burdens of ownership."

In McGalliard v. Liberty Leasing Co. of Alaska, Inc., supra, Liberty advanced funds to a vendor of trade fixtures. The fixtures were delivered to McGalliard and the parties entered into a "lease" agreement like the ones at bar. In holding the agreement to be a void usurious loan, the Alaska Supreme Court relied on the following facts--all present in the instant case: McGilliard had selected the equipment; Liberty's sole involvement was advancing funds; McGalliard's payments were calculated as if they were comprised of loan interest; Liberty had no retail sales business, no showrooms, inventory or catalogs; McGalliard paid for insurance, repairs and bore all risk of loss; Liberty assigned the contract shortly after executed; and McGalliard had a purchase option at a nominal price.*

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*National tries to distinguish McGalliard by the fact that unlike New York, Alaska's usury statute applies to "sales" (app. br. pp. 12-13). That fact was clearly of no consequence to the McGalliard court which clearly stated (id., 534 P. 2d, at 533):

> "Because we conclude that the Liberty/McGalliard transaction was a . . . loan, it is not necessary to consider the applicability of the Alaska usury

In short, as established by Stanley, McKeeman, and McGalliard, the evidence in this case was more than sufficient to legally support the jury's determination that the transactions were loans. National's citation of authority (app. br. p. 12) that New York's usury laws do not apply to conditional sales or purchase money mortgages misses the point: the jury found the transactions here were loans. And as detailed above that finding was amply supported by the evidence.

(ftn contd)

statutes to commercial or retail sales." (Emphasis supplied.)

National's reliance on Burr v. Capital Reserve Corp., 80 Cal. Rptr. 345, 458 P. 2d 185 (1969), is misplaced since the trial court there found the transaction was not a loan. The only inquiry here is whether the evidence was sufficient to support the finding that the National/Hendrix transaction was a loan.

POINT II

National's Contention that the Usury Laws Do Not Apply to the Transactions at Bar because Hendrix Utilized the Funds Advanced for a Business Purpose Is Without Merit

National argues (app. br. Point V, pp. 17-21) that the New York usury laws do not apply to the transactions at bar since Hendrix utilized the funds advanced by National for a business purpose, to wit, to retain possession of and protect his equity in two pieces of heavy construction equipment he utilized in earning his living. The argument is baseless and ignores case law of this Court and the New York Court of Appeals directly in point holding to the contrary.

In Ranhand v. Sinowitz, 26 N.Y. 2d 232, 257 N.E. 2d 877 (1970), the New York Court of Appeals squarely held that an individual borrower was entitled, as a matter of law, to raise the defense of usury even though the proceeds of the loan made to him personally were to be used by him for the benefit of his wholly owned restaurant corporations. The Court ordered that summary judgment be entered for the borrower on his usury defense and wrote as follows (id., 26 N.Y. 2d, at 235):

> ". . . the loans were made to the defendant personally to be used for the benefit of the corporate enterprises 'owned' by the defendant. However, it is clear that the obligations represented by the promissory notes sued upon were those of the defendant individually and there is no indication whatever of any corporate obligation. The mere fact that the borrowed funds were expected to be or were intended to be used for corporate purposes cannot transform an individual obligation into a corporate obligation." (Emphasis supplied.)

And in National Equipment Rental, Ltd. v. Stanley, supra, 283 F. 2d 600, this Court affirmed an Eastern District of New York judgment holding an agreement between National and a South Carolina druggist unenforceable because the transaction, nominally an "equipment lease," was in reality a usurious loan. In that case, as here, National advanced funds for use by the individual borrower in a business enterprise.

National's reliance on two statutory prohibitions on asserting the defense of usury is misplaced. New York General Obligations Law §§5-501(6) and 5-521 bar the defense of usury to individual borrowers who borrow more than $250,000 and to all corporate borrowers. Neither section applies here since the loan at issue was not made to a corporation nor was it for an amount in excess of $250,000.

Nor can these two statutory prohibitions on asserting the usury defense be interpreted as barring the usury defense to individual borrowers who borrow less than $250,000 and utilize the borrowed funds for business purposes. The intent of the usury laws is to protect the needy consumer borrower from the unjust oppression of the moneylender. See, e.g., Malmud v. Blackman, 251 App. Div. 192, 295 N.Y. Supp. 398 (2d Dept. 1937). The legislative determination that an individual who borrows more than $250,000 is not a "needy" person to be protected by the usury laws cannot possibly be applied to one who borrows less than the statutory amount. The memorandum of the New York City Bar Association explaining this section of the usury statute makes it clear that:

> "In continuing the application of the usury laws to loans of less than $250,000 . . . the bill would have no effect on the ordinary consumer who would continue to be protected under existing law." (New York State Legislative Annual, p. 94 [1974]). (Emphasis supplied.)

Moreover, the suggestion by National that Hendrix was not "needy" simply because he was borrowing for a business purpose is ridiculous. The uncontradicted proof is that Hendrix was in need of the financing provided by National in order to retain possession of two pieces of equipment

he was purchasing from two vendors which were essential to his business and ability to earn a living. National's loan enabled Hendrix to protect the equity he already had in the equipment by paying off the entire balance owed the vendors on the equipment and in turn repaying National a lower monthly amount than he had been paying to the vendors. The simple fact is that Hendrix was compelled to borrow from National on National's terms to avoid losing the equity he had in the equipment, the equipment itself and, indeed, his livelihood.

That the usury laws were intended to apply to precisely such a situation is beyond cavil. As one authority summarizes the intent of the usury laws:

> "It is the necessitous individual who is protected against usury because the power of the lender to relieve the borrower's needs creates the opportunity for oppression." (32 N.Y. Jur. Interest and Usury, §5 [1963]).

National's representation that Leibovici v. Rawicki, 57 Misc. 2d 141, 290 N.Y. Supp. 2d 997 (Civ. Ct. N.Y.C. 1968) and Schneider v. Phelps, 41 N.Y. 2d 238, 359 N.E. 2d 1361 (1977), indicate a trend in New York courts to disallow usury as a defense in cases where the proceeds of a loan are utilized for a business purpose is misleading and inaccurate. In Leibovici, supra, the Civil Court of New York City held that where one advances money to an investor

for investment purposes with the investor's guaranty that the capital plus 10 percent will be returned, the transaction is not a loan of money subject to the usury laws but rather a joint investment venture transaction between the two parties. In language which clearly distinguishes Leibovici from the instant case, (misleadingly and only partially quoted by National in its brief, app. br. p. 20) the court there wrote (id., 290 N.Y. Supp. 2d, at 1001):

> "The defense of usury is not available to the one 'who promotes the advances for the purpose of employing the money in the business venture and who dictates the terms of repayment' (citation omitted.)" (Emphasis supplied.)

Unlike Leibovici, National was certainly not advancing funds to Hendrix for him to invest in a joint venture; and Hendrix had absolutely nothing to do with "dictat[ing] the terms of repayment."

In Schneider, a loan had been made to a corporation and personally guaranteed by Mrs. Phelps, the principal stockholder. Mrs. Phelps asserted the defense of usury. The Court of Appeals recognized the general rule that the guarantor on a corporate loan cannot interpose the usury defense, but ruled that summary judgment for the lender was inappropriate where a genuine factual issue existed as to whether "the corporate form [was] used to conceal a usurious

loan to an individual guarantor" (id., 391 N.Y. Supp. 2d, at 570). In deciding the factual issue, the Court of Appeals suggested that if the proceeds of the loan were used for a business purpose that fact would indicate that the corporate form was real--not a sham--and would preclude the usury defense under N.Y. Gen.Oblig. Law §5-521. On the other hand, if the funds were used for personal purposes that fact would indicate that the corporation was merely a vehicle to avoid the consequences of the usury laws and the usury defense would apply.

The Court never stated nor suggested that a loan made to an individual for a business purpose was not subject to the usury laws. National's argument to the contrary is baseless.

POINT III

National's Motion to Strike Hendrix' Demand for a Jury Trial Was Properly Denied Since the Jury Trial Waiver Provision in National's Adhesion Contracts Did Not Constitute a Knowing and Intelligent Waiver by Hendrix of His Constitutional Right to a Jury Trial

As its lead point in this appeal, National asserts that it was reversible error for the trial court to have granted Hendrix' demand for a trial by jury. Based on a jury trial waiver contained in the agreements between Hendrix and National, National moved prior to trial to strike Hendrix' demand as to the issues raised by the complaint, denials, and certain of the affirmative defenses and counterclaims and sought a separate jury trial as to the remaining issues.* Judge Weinstein denied National's motion to strike because he found that the contracts between Hendrix and National were "contracts of adhesion" not amounting to Hendrix' voluntary and knowing abandonment of a constitutional right. Although the court's order was without prejudice to National to submit additional

*Since the guaranty agreement between National and Mrs. Hendrix did not contain a jury trial waiver and certain of Hendrix' counterclaims did not come within the embrace of the waiver clause in the agreements between National and Mr. Hendrix, the granting of National's motion to strike would in any event have resulted in a wasteful and duplicative second trial.

evidence (A2, see docket entry for 6-25-75), none was ever submitted and both the first and second* trials were before a jury.

The trial court was correct both factually and legally in denying National's motion to strike. The Seventh Amendment right to a trial by jury is a fundamental constitutional right. Dimick v. Schiedt, 293 U.S. 474, 486 (1935); Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937). For a waiver of such a fundamental right to be effective, the circumstances of the waiver must be such as to overcome "every reasonable presumption against waiver" (Aetna Insurance Co. v. Kennedy, supra, 301 U.S., at 393, Beacon Theatres v. Westover, 359 U.S. 500, 510 [1959]) and establish "an intentional relinquishment or abandonment of a known right." Johnson v. Zerbst, 304 U.S. 458 (1937); Heyman v. Kline, 456 F. 2d 123, 129 (2d Cir. 1972).

In the case at bar, National's reliance solely on the contract waiver provision fails to overcome the presumption against waiver. The waiver provision is buried as the last sentence in the eleventh paragraph (entitled "OTHER COVENANTS", A171, A173) on the backside of a fine print, sixteen clause,

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*National again moved prior to the second trial to strike Hendrix' jury demand. That motion was also denied (A4, docket entry for 3-29-77).

complex contract. Mr. Justice Black characterized National's contract as a "printed form" containing such "a multitude of words" that "it exhausts credulity to think that...any... laymen reading these legalistic words would have known or even suspected that they amounted to an agreement [to waive a constitutional right]." National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 332-333 (1964)(Black, J., dissenting).*

Aside from the coercive aspect of the printed-form contracts themselves, it is clear that National presented Hendrix with a take-it-or-leave-it situation. As National's representative knew, Hendrix was in need of National's funds (A50 - A52). There was a gross inequality between Hendrix and National in bargaining power, and the proof was that Hendrix was not informed of nor even aware of the waiver provision. Indeed, Hendrix testified about the contract "negotiation" as follows (A73 - A74):

> "A Well, I spoke up more than anybody else and said that it was so much writing on it, we couldn't understand it all,

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*The majority opinion in Szukhent, supra, never addressed the question of whether the waiver at issue in that case-- the waiver of personal service of process on the defendant--was a knowing and intelligent one. The issue addressed was whether the person upon whom process was served was an agent authorized to receive it so as to subject the defendants to jurisdiction of the federal court in New York.

"shouldn't we get an attorney
and get some advice on it . . .
Q What was said back to you, sir?
A Well, they told me that it was a
standard leasing agreement. They were
both in a hurry, it was after lunch,
they had people to see. They assured
me that it was a standard agreement and
that's the way National loaned their
money."

Unilaterally drawn to the sole economic advantage of National, the agreements in this case, presented to Hendrix on a take-it-or-leave-it basis, were contracts of adhesion. Far from reflecting a knowing and intelligent waiver of a constitutional right, the jury waiver provision relied upon by National was merely another phrase in a multitude of clauses, phrases and words which Hendrix did not understand and certainly cannot be said to have bargained for or agreed to.

Fuentes v. Shevin, 407 U.S. 67 (1971), is in point. In that case the Supreme Court held that upon default of a conditional sales contract, the prejudgment seizure of property from the purchaser pursuant to state replevin statutes violated due process where the seizure occurred prior to an opportunity to be heard. The Court bluntly rejected the contention that the due process rights of the purchaser were waived by a clause in the printed form conditional sales contract which provided that upon default the seller "may take back the merchandise" (id., 407 U.S., at 94).

In holding that the printed form contract failed to establish a "clear" waiver of constitutional rights, the Court wrote as follows in language which is controlling here (id., 407 U.S., at 95):

> "There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. [There was] no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights."

See also, U.C.C. §2-302 which defines "unconscionability" as including adhesion contracts of the sort at issue here where there is "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party", Williams v. Walker-Thomas Furniture Co., 350 F. 2d 445, 449 (D.C. Cir. 1965); and compare, D. H. Overmyer v. Frick Co., 405 U.S. 174 (1972), where the Supreme Court upheld a contractual waiver of due process rights only after finding that the waiver was "voluntarily, intelligently, and knowingly" made (id., 405 U.S., at 187).*

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*Unlike the instant case, the contract at issue in Overmyer was negotiated between two corporations and the specific waiver provision was bargained for and drafted by the parties' attorneys. Indeed, the Court stated that the contract was "not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion." Id., 405 U.S., at 186.

National's citation of two of its own cases in state trial courts is inapposite. In both cases National's lawsuit was against corporate defendants. Indeed, in National Equipment Rental, Ltd. v. Custom Machine Engineering Div. Chromalloy Div. of Okla., Index No. 11210/75 (Sup. Ct. Nass. Co. Sp. Term Pt. I, Jan. 27, 1977), Judge Wilkes granted National's motion to strike the defendant's jury demand specifically stating:

> ". . . the defendants are not the kind of . . . consumers who are most commonly involved in cases dealing with jury trial waiver [citation omitted]. The parties herein are corporations and corporate officers with a presumptive degree of business acumen." (Emphasis supplied.)

No such finding is possible in the case at bar. In fact, in denying National's motion to strike, Judge Weinstein specifically held the contracts to be "contracts of adhesion" which did not result in Hendrix' knowing waiver of his constitutional right to a trial by jury. That right was plainly not intelligently bartered away by Hendrix in the course of contract negotiations between equals. The waiver clause, drafted by National's attorneys and inserted inconspicuously at the end of a long paragraph dealing with "OTHER COVENANTS" on the backside of a small print contract

described to Hendrix as "standard", is simply not sufficient to justify a finding that Hendrix waived the fundamental constitutional right of a jury trial.

CONCLUSION

The judgment dismissing National's complaint should be affirmed.

September, 1977

Respectfully submitted,

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STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

ELIZABETH CAMERINO, being duly sworn, says: that I am not a party to the action, am over the age of 18 years and that on the 26th day of September, 1977, I served a true copy of the within BRIEF FOR DEFENDANTS-APPELLEES upon Jonathan V. Pollack, Esq., Marcus, Maltinsky & Katz, P.C., attorneys for plaintiff-appellant in this action, at 1501 Franklin Avenue, Mineola, New York, 11501, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Elizabeth Camerino
ELIZABETH CAMERINO

Sworn to before me this
26th day of September, 1977.

Mark S. Arisohn
Notary Public

MARK S. ARISOHN
Notary Public, State of New York
No. 4512713, Westchester County
Commission Expires March 30, 1979